No. 83-747

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY,
Petitioner,

v.

PAUL D. JOHNSON, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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REPLY BRIEF

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1. Respondents' chief argument is that WMATA is not entitled to immunity under Section 905 because that provision is limited to an "employer." In addition, respondents claim that any immunity to which WMATA is otherwise entitled should exclude liability for the acts of WMATA's agent, Bechtel. Neither claim is correct.

a. Respondents first contend (Resp. Br. 7-8) that the absence of the word "contractor" from Section 905 indicates that Congress intended only an immediate "employer" to receive immunity, and not a contractor who meets precisely the same duty.[1] Respondents have offered no reason why Congress would have intended such an arbitrary result, and there are compelling reasons demon-

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[1] Respondents' argument presumably applies equally to a securing subcontractor that was not an immediate employer.

strating that this was clearly not Congress' intent. Indeed, respondents themselves concede—and contend—that the term "employer" used throughout the Act includes a "contractor" in some instances. Resp. Br. 31 n.40. Their position is that "employer" in Section 905(a) does *not* include a contractor, but that the same term when used in Sections 907-909 *does* include a contractor. *Id.* Respondents cannot have it both ways.

As we showed in our initial brief (Pet. Br. 30-33), if a "contractor" has no responsibilities or privileges under the LHWCA except where the word "contractor" appears, the statute's entire compensation system will come to a halt in any case where a "contractor" secured the compensation. Nowhere in the Act except Section 904 does the word "contractor" appear. But that section does *not* require the contractor to deliver the benefits it has secured; the pay-out sections are 907-909 and 914, and they speak only of an "employer['s]" responsibilities. Hence, if, as respondents say, a securing contractor such as WMATA cannot be deemed to be an "employer" even though it has performed an employer's duties, WMATA should halt all compensation payments immediately.[2] Congress surely could not have intended a construction that would so frustrate the Act's purpose.[3]

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[2] Under respondents' theory, if the general contractor and the subcontractor-employer both fail to secure compensation, only the subcontractor-employer would be held liable for civil and criminal sanctions under Sections 914(h) and 938, because only an "employer" is covered by those sections. Moreover, a contractor could not be sued by an employee for compensation (Sections 918(a) and 921(c)) and, if sued for negligence, would not lose any tort defenses (Section 905(a)), again because it is not an "employer." Indeed, if respondents' construction of the statute is correct, a contractor can simply refuse to fulfill its responsibilities under Section 904(a) altogether with complete impunity. Such a contractor need never secure, and never pay, confident that there is no LHWCA enforcement power that applies to it.

[3] *Bloomer* v. *Liberty Mut. Ins. Co.*, 445 U.S. 74, 85-86 (1980). As the Court has stated, " '[i]n expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the

Respondents only answer to this is that "[o]bviously, the contractor would also be responsible for obeying other sections which relate to the payment of those benefits." Resp. Br. 31 n.40. Respondents never explain—because there is no explanation—why a contractor should "obviously" be treated as an "employer" under the pay-out sections but not the immunity section. There is simply no principled distinction between the two. We submit that WMATA is either an "employer" under all these sections, or an "employer" under none.

Furthermore, respondents' contention flies in the face of the *quid pro quo* theory upon which the LHWCA hinges, *i.e.*, that tort immunity will be received in exchange for the guaranteeing of swift, sure delivery of compensation benefits.[4] If WMATA had directly employed every Metro construction worker, and had insured all those workers pursuant to its Section 904 duty, there is no question that it would now be entitled to Section 905 immunity. It borders on the irrational to suppose that Congress intended a different result where WMATA engaged the same workers, met the same duty to cover those workers, but, instead, used subcontractors on the project for reasons wholly unrelated to the LHWCA.[5]

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provisions of the whole law, and to its object and policy.'" *Philbrook* v. *Glodgett*, 421 U.S. 707, 713 (1975) (citation omitted).

[4] *Potomac Elec. Power Co.* v. *Director, OWCP*, 449 U.S. 268, 281-282 (1980); *Cardillo* v. *Liberty Mut. Ins. Co.*, 330 U.S. 469, 476 (1947); 2A A. Larson, *The Law of Workmen's Compensation* § 65.11, at 12-1 to 12-6 (1983).

[5] Respondents add, however, that "WMATA has, in effect * * * received a *quid pro quo* by virtue of its instruction to contractors to recognize that WMATA has purchased compensation insurance for them when submitting their bids." Resp. Br. 13. We assume this is not a serious argument that WMATA received the *quid pro quo* that *Congress intended*. Furthermore, the contention overlooks the fact that WMATA itself paid the full price for the compensation insurance. Finally, the *quid pro quo* invented by respondents is in any event a mirage. In practice, as respondents' own cited studies indicate (Resp. Br. 36 n.49, 37 n.51), subcontractors on wrap-up projects do not reduce their bids to recognize saved insurance

The purpose of Section 904 was to make sure that the "employer" duty to secure compensation was met, and to that end Congress placed that duty on contractors and subcontractors alike.[6] Hence, the obvious reason that neither "contractor" nor "subcontractor" appears in Section 905 is that whichever one meets the "employer" duty imposed by Section 904 necessarily receives the "employer" immunity granted by Section 905. As Professor Larson has stated, "[s]ince the general contractor is * * * in effect *made the employer for the purposes of the compensation statute*, it is obvious that he should enjoy the regular immunity of an employer * * *."[7]

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costs but include those costs in their bids anyway. *E.g.*, Ashley, *Preliminary Insurance Program Selection for Urban Mass Transit Project Construction* 11 (Dept. of Transp. 1981).

[6] Respondents contend (Resp. Br. 9-15) that the New York law upon which the LHWCA was modeled supports their construction of Sections 904 and 905 because the language of the two laws is "very similar." In fact, the two laws are materially different. For present purposes (*see also* page 8 note 11, *infra*), the most significant difference is that, quite unlike Section 904, under New York law a contractor *had no duty to secure*. This difference between the two statutes is crucial, as the New York courts' own decisions make clear. *Sweezey* v. *Arc Elec. Constr. Co.*, 295 N.Y. 306, 67 N.E.2d 369, 371 (1946), held that a general contractor does not receive immunity precisely because a general contractor does *not* have the *same duty* as the subcontractor—*i.e.*, because the contractor "is not bound to *secure* compensation as an employer" (emphasis in original). *See also Clark* v. *Monarch Eng'g Co.*, 248 N.Y. 107, 161 N.E. 436 (1928) (holding the difference between the contractor and subcontractor duties to be material, but not reaching the immunity issue). If anything, the New York law supports WMATA's position, not respondents'.

[7] 2A A. Larson, *supra*, § 72.31(a), at 14-112 (emphasis added). Respondents would have this Court believe that the decided cases are contrary to Professor Larson's statement. Resp. Br. 27-29. But that is not so. The reason that "no appellate decision has found a general contractor to be immune under Section 905(a)" (Resp. Br. 27) is simply that *no decision* (including *all* those cited by respondents, pp. 27-29) has involved a contractor that met a duty to secure under Section 904. More importantly, *no case* has ever *denied* immunity under Section 905 on the ground advanced by

b. Respondents' second argument is that, even if WMATA is entitled to Section 905 immunity, the immunity should not extend to liability that WMATA might otherwise have for the acts of its agent, Bechtel. Resp. Br. 41-44. The sole basis for this contention is respondents' claim that WMATA would not be liable for Bechtel's actions under ordinary tort principles, but is liable *only* by virtue of Section 80 of the WMATA Compact.[8] Hence, say respondents, it is unfair to cloak WMATA's special Section 80 liability with Section 905 immunity. This contention is completely unsound for three separate reasons.

First, respondents' argument is directly contrary to the plain language of the LHWCA. Section 905(a) makes an employer's compensation liability "exclusive and in place of *all other liability of such employer to the employee* * * * on account of such injury or death * * *" (emphasis added). No exception is made to this immunity where the employer's potential tort liability happens to be due to its agent's acts, just as no exception is made to an employer's obligation to pay compensation where the cause of injury is due to the agent's acts.

Moreover, respondents' argument rests upon an erroneous premise—that but for Compact Section 80, WMATA would not be liable for Bechtel's torts (because, according to respondents, Bechtel is an independent con-

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respondents here—that a "contractor" cannot receive "employer" immunity. Indeed, as Professor Larson has catalogued, "the great majority" of state courts specifically recognize the principle that a party required by statute to take on "employer" duties necessarily becomes a "statutory employer" for all other workmen's compensation purposes, including the receipt of "employer" immunity. *Id.* *That* is the principle presented here. Far from being the unprecedented step respondents imply, recognizing that WMATA acted as a "statutory employer" in this case would be well within the mainstream of decided case law.

[8] Section 80 provides in pertinent part: "The Authority [WMATA] shall be liable * * * for its torts and those of its * * * agent * * * in accordance with the law of the applicable signatory * * *."

tractor and not an agent under District of Columbia tort law). But as the Court of Appeals recognized, WMATA *would* be liable under District of Columbia tort law for Bechtel's torts *regardless* of whether Bechtel was an independent contractor or an agent, because WMATA had a nondelegable duty "to protect workers from physical harm caused by the construction of Metro." Pet. App. 45a n.6. Hence, WMATA's liability for Bechtel's torts is in fact based on local tort law, not Section 80, and, as respondents concede (Resp. Br. 43), such tort liability is indeed immunized by LHWCA Section 905(a).

Finally, even if respondents were correct that WMATA would not be liable for Bechtel's torts under local tort law, *that* would be the reason respondents could not recover from WMATA for Bechtel's negligence; WMATA's Section 905 immunity would in that case be irrelevant. Section 80 of the Compact simply renders WMATA *amenable* to suit for Bechtel's torts by providing for a limited waiver of sovereign immunity; it does not of its own force render WMATA *liable* for anything. To the contrary, Section 80 expressly incorporates local tort law (page 5 note 8, *supra*), which, according to respondents, would exonerate WMATA for Bechtel's torts. Under respondents' own theory, therefore, they could not recover from WMATA for Bechtel's negligence at all—whether or not WMATA is entitled to immunity under Section 905.

2. LHWCA Section 904 makes plain that a contractor cannot avoid its "employer" duties under the LHWCA by the simple device of subcontracting its work. Even though the contractor carries out its work through its subcontractor's employees, under Section 904 the contractor still has its duty to secure compensation payment for those employees, and is not relieved of that duty "unless the subcontractor has secured such payment" already.[9] That is the duty WMATA unquestionably met in this case.

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[9] It is clear that the purpose of this provision is to guard against an employer subcontracting to irresponsible firms who then fail

Respondents do not dispute that WMATA secured their compensation and did so at a time when its subcontractors had not secured.[10] Neither do they defend the Court of Appeals' view that WMATA could not legitimately secure until it had "*first* require[d] its subcontractors to purchase the insurance." Pet. App. 54a (emphasis in original). Instead, respondents assert that WMATA simply had no duty to secure their compensation, and, hence, that the benefits they have re-

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to provide coverage for their employees. *E.g., Director, OWCP* v. *National Van Lines, Inc.*, 613 F.2d 972, 986 (D.C. Cir. 1979), *cert. denied*, 448 U.S. 907 (1980); 1C A. Larson, *supra*, § 49.11, at 9-14 to 9-16.

[10] Respondents do complain, however, that a subcontractor who loses "the race" to secure compensation will fail to "win" immunity and be "in default of his statutory obligation." Resp. Br. 16-17. This is inaccurate on several counts. First, as we explained in our initial brief (Pet. Br. 29-30 n.41)—and as respondents do not dispute—securing compensation is not a "win"; WMATA has spent over $175 million since 1971 to secure compensation for its subcontractors' employees. Thus, the "prize" of immunity came dear, considering that it could in substance have been purchased for far less through the simple device of liability insurance.

Second, any WMATA subcontractor who wanted to "win" the race to secure has always had that opportunity. Every subcontractor has had (and has now) the option to purchase compensation insurance for its employees. J.A. 104. Had any individual subcontractor done so, however, WMATA would not have removed wrap-up coverage for that subcontractor's employees; instead, WMATA would have maintained that coverage to ensure that those employees would be protected in the event the subcontractor's individual insurance failed. And, so long as the subcontractor's insurance was maintained, WMATA would have achieved cost savings because its wrap-up premiums are based on loss claims filed against *WMATA's* policy. J.A. 88-92.

Finally, no subcontractor was placed "in default" of its own Section 904 duty when WMATA secured compensation. Although both WMATA and its subcontractors had the duty to ensure that compensation was secured, satisfaction of that duty by either party relieved the other of any need to purchase duplicative insurance. Congress obviously did not intend the wastefulness of both actually purchasing insurance coverage.

ceived from WMATA must be adjudged a *volunteered* windfall.[11]

a. Respondents first contend that WMATA purchased its wrap-up policy to meet its subcontractors' Section

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[11] As a preliminary matter, respondents extensively argue that WMATA had a "secondary" rather than a "primary" duty to secure compensation. Resp. Br. 15-18. This issue is immaterial. Even if WMATA's duty were only "secondary" (in the sense that WMATA had no duty "unless the subcontractors ha[d] [not] secured"), here that duty was triggered. Moreover, it is difficult to see how this issue is pertinent even to respondents' position, since their view is either that WMATA *never* had *any* duty under the statute (primary, secondary, or otherwise), or, if it had one, that it *never* intended to meet that duty. Resp. Br. 19-22.

Nevertheless, even if the "primary-secondary" issue were relevant, the three authorities relied on by respondents prove, if anything, that Congress intended WMATA to have the "primary" duty. Respondents first refer to a bill offered by Senator Prouty in 1971. The bill would have granted *immunity* to *vessel owners*—which has absolutely nothing to do with *land-based contractor duties*—and in any event the bill died in Committee.

Second, respondents cite Section 56 of the New York workmen's compensation law. That section makes a subcontractor "primarily liable" for workmen's compensation benefits and places on the *subcontractor alone* the duty *to secure* such compensation; the sole responsibility of a contractor under the section is "to pay" compensation to any injured employer in any case where the subcontractor has failed in its duty. In Section 904, however, Congress omitted the language making subcontractors "primarily liable"; in addition, it placed the duty to secure on the *contractor*, a duty that can be relieved only if the subcontractor has itself secured.

Finally, respondents cite Section 937 of the LHWCA. That section expressly prohibits a vessel owner from hiring a stevedoring firm unless the stevedore first presents proof to the vessel that it has in fact already secured compensation for its employees. However, this section proves our point—that when Congress *intended* to place a "primary" duty on a party, it knew how to do so; the fact that it did so in Section 937 for stevedoring firms, but did not do so in Section 904 for similarly situated land-based subcontractors, shows that no such "primary" duty was intended for land-based subcontractors. *See Russello* v. *United States*, 104 S. Ct. 296, 300 (1983).

904 duty, rather than its own." [12] Resp. Br. 19. This is incorrect.[13] WMATA's Secretary and Director of its insurance program (J.A. 231) offered unrefuted testimony [14] that WMATA adopted the program expressly

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[12] Respondents also take the remarkable position that a contractor has no duty under Section 904 to the employees of any subcontractors "with whom it is not in a contractual relationship." Resp. Br. 21 n.24. In other words, respondents believe a contractor may avoid all responsibilities under the Act by having its subcontractors delegate work to subcontractors of their own. This is plainly contrary to the language and purpose of Section 904.

[13] It was precisely due to WMATA's statutory responsibility that WMATA's wrap-up policy *had* to name as insureds all WMATA's subcontractors and sub-subcontractors; *i.e.*, the reason was to identify which employer's employees were covered by the policy. Contrary to respondents' and amici subcontractors' arguments (Resp. Br. 19-20; Amici Br. 5-6), WMATA was obliged to name these subcontractors as insureds in order to meet its own Section 904 duty. (Amici subcontractors are only seven of the over 3100 Phase II subcontractors of various tiers involved in Metro construction.) The reason WMATA acquired compensation insurance and certificates of insurance "for the benefit" and "on behalf of" its subcontractors' employees was that it was *WMATA's duty* to do so under Section 904, and it could meet its own Section 904 duty in no other way than it did in this case.

In an effort to persuade the Court that WMATA secured not for itself but for them, the amici subcontractors misrepresent the record. They contend that "[a]t no time was WMATA a named insured for workers' compensation." Amici Br. 5. This is both untrue (J.A. 127, 130, 225) and unimportant. The important "insureds" here are not WMATA or its subcontractors, but those subcontractors' *employees*. It was those employees that WMATA undisputably insured pursuant to its Section 904 duty.

[14] Further evidence demonstrating the unsoundness of respondents' claim lies in Section 933 of the LHWCA. Had WMATA intended to meet only its subcontractors' duty to secure and not its own, it must also have intended that its subcontractors would succeed to all WMATA's assignment rights under Section 933. Under that section, the securing employer succeeds to the injured employee's third-party rights, and, upon recovery against such third party, the securing employer recovers "all amounts paid as compensation" plus 20% of any recovery above that amount. Section 933(e)(1)(c) and (2). It is nonsense to suppose that WMATA

to meet its Section 904 duty (J.A. 263-265, 297-299).[15]

b. Respondents next argue that permitting a contractor such as WMATA to secure compensation will threaten "[t]he desire of Congress to promote a safe workplace." Resp. Br. 23. Specifically, respondents contend that "statutory immunity should be denied" WMATA in order to ensure that the "direct employer" will in all cases "bear the cost of unsafe [work] conditions" by itself making premium payments. Resp. Br. 22-23. But it cannot be legitimately claimed—as respondents apparently do—that Congress *never* intended a contractor to purchase compensation insurance because doing so threatens the safety incentives of "direct employers." If that were so, Section 904 would not require contractors in some cases to secure. Moreover, the contention that *WMATA's* purchase of insurance premiums undermined job safety is directly contrary to the facts. *See* Pet. Br. 41-42 & nn.61-63. Through its Coordinated Safety Program [16] and

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would have wanted to confer such a windfall upon subcontractors who had not paid one cent in insurance premiums.

[15] Although we assume the subcontractors' duty to secure was relieved by WMATA's satisfaction of its own duty to secure, it does not follow that the subcontractors are necessarily entitled to immunity along with WMATA. Amici subcontractors contend that this Court should decide that issue in this case. But these amici are worried about the next case, not this one. The issue whether they secured and are entitled to immunity was reserved by the Court of Appeals (Pet. App. 56a n.16) and is not necessary to the decision here. The only questions here are whether WMATA had a duty to secure, and, if so, whether it is entitled to immunity. Whether or not this Court agrees with WMATA on these two questions, there will be time enough in the cases that have been filed against the amici for the issue of their immunity to be decided on a full record. (Indeed, one of amici's primary complaints (Amici Br. 2-3) is that, not being parties below, they have not yet had a chance to make a record on this issue.)

[16] J.A. 132-161. A primary objective and advantage of wrap-up insurance programs is that they allow and encourage the implementation of a *coordinated* safety program, administered by one general contractor, one insurance carrier, and one claims-handling and loss-control firm. National Academy of Sciences, ***Better Con-***

its system of monetary incentives for subcontractors with accident-free workplaces,[17] WMATA has achieved an unmatched safety record on the Metro project.[18] Hence, respondents' argument that safety concerns should require a wholesale revision of Section 904 is completely without foundation.[19]

c. Finally, respondents contend that WMATA is not a "contractor" at all within the meaning of Section 904, and therefore had no duty to secure compensation. Resp. Br. 23-27. This contention was rejected out of hand by the courts below. The District Court found that "WMATA clearly fulfills the function of overall general contractor of the rapid transit system" (Pet. App.

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tracting for Underground Construction 36 (1974); General Services Administration, *Wrap-Up Study* 3, 12 (August 22, 1975). In fact, the job-safety advantages offered by wrap-up programs are considered a *better* justification for its implementation than possible cost savings, since those savings will not occur if safety and loss control are not achieved. GSA, *supra*, at 16.

[17] Although respondents object to our reference to WMATA's Safety Award Program, respondents themselves introduced the Coordinated Safety Program as part of their deposition of WMATA Secretary Del Ison, but failed to include the component Safety Award Program which was then, and is now, in force. In any event, the effectiveness of WMATA's Safety Award Program is documented in a study respondents rely on themselves. Ashley, *supra*, app. B, at B2-B3.

[18] It may well be that this safety record is, as respondents say, directly related to the payment of insurance premiums. Since WMATA itself pays the premiums for the whole project, and since those premiums are themselves directly premised on the dollar amount of incurred losses, WMATA plainly had the incentive to produce the fine safety record that has in practice resulted. J.A. 88-91.

[19] Respondents may intend their safety concerns to be considered *only* in a case where the securing contractor is otherwise deemed to be a "volunteer." Resp. Br. 22-23. If so, respondents presumably wish their argument disregarded unless the Court first accepts their view that WMATA "voluntarily" intended to meet only its subcontractors' duty. As we have already shown (pages 9-10, *supra*), WMATA was not such a "volunteer," but intended through the wrap-up program to meet its own Section 904 duty.

28a),[20] and the Court of Appeals acknowledged that "WMATA exercises the ultimate control of and authority for the construction * * * of the subway system." *Id.* at 42a; *see also id.* at 52a-55a. Nothing in respondents' arguments shows that these factual findings should now be overturned.[21]

First, WMATA fits comfortably within the definition of "contractor" offered by respondents, as the record and the findings below make clear.[22] Second, respondents' contention that WMATA has sometimes referred to itself in other terms,[23] *e.g.*, as "WMATA" or the "Authority," [24] is of no moment; what matters is that WMATA

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[20] *Accord*, Pet. App. 1a, 2a, 3a, 7a, 10a, 14a, 24a, 32a-36a.

[21] The District Court's findings were left undisturbed by the Court of Appeals, which necessarily rejected respondents' arguments. *See* Pet. Br. 21 n.28. This Court has frequently noted its reluctance to disturb findings of fact concurred in by two lower courts, and should refuse to do so in this case. *United States* v. *Doe*, 104 S. Ct. 1237, 1243 (1984); *Rogers* v. *Lodge*, 458 U.S. 613, 623 (1982).

[22] Respondents cite R. Clough, *Construction Contracting* 3 (4th ed. 1981) for the proposition that a prime or general contractor is one "in contract with the owner for the construction of the project, either in its entirety or for some specialized portion thereof." Resp. Br. 24. The same reference also states that such a contractor is one "who brings together * * * the construction process into a single, coordinated effort" and does so through "close management control." Clough, *supra*, at 3-4. There is no doubt on this record that WMATA performed precisely these tasks. Through its Department of Design and Construction and its agent, Bechtel, WMATA supervises, controls, and monitors all work performed by its numerous subcontractors, coordinating their respective responsibilities for distinct portions of the WMATA system. J.A. 163-184, 276-280. And it alone is responsible for the construction of the entire project.

[23] In addition, respondents refer to certain contracts in which parties to whom WMATA subcontracted discrete portions of the project were themselves called "contractors." But this hardly makes WMATA itself any less an *overall general* contractor. Moreover, the referenced "contractors" had limited and subordinate roles at their particular construction sites, as the record demonstrates. *See, e.g.*, J.A. 192-193, 212-214.

[24] Respondents also cite *WMATA* v. *Mergentime Corp.*, 626 F.2d 959 (D.C. Cir. 1980), for the proposition that "[t]he judiciary has

performed the role of a "contractor" within the purposes of Section 904,[25] not the particular *labels* that may have been used by WMATA or other parties for different purposes. Moreover, respondents themselves have characterized WMATA as the "general contractor" on the Metro system in their Brief in Opposition before this Court, in an appellate brief filed in the District of Columbia Court of Appeals, and in several federal District Court complaints in cases similar to these.[26] Third, respondents' contention that "WMATA cannot be considered a contractor [because] it does not have a contractual obligation" (Resp. Br. 25) is simply not so.[27] WMATA has a contractual obligation to build a rapid transit system pursuant to the WMATA Compact.[28] Finally, respondents' reliance on Professor Larson's treatise for the proposition that the purposes of the LHWCA "are not served by imposing * * * compensation liability on entities such as WMATA" (Resp. Br. 24, 27) is completely unfounded.

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* * * recognized that WMATA is an owner." Resp. Br. 25 n.30. This mischaracterizes the cited case. *Mergentime* involved a contract dispute in which the court, solely for convenience, adopted the "owner" and "contractor" labels used by the parties to the contract. The court made no legal or factual determination that WMATA was an "owner" even for purposes of that case, much less for purposes of the LHWCA.

[25] *See Director, OWCP* v. *National Van Lines, Inc.*, 613 F.2d at 986.

[26] Respondents' Brief in Opposition, at i, 3, 9; Brief of Appellant at 21 & 22 n.2, *Smith* v. *Bechtel Assoc. Prof. Corp., D.C.*, 466 A.2d 436 (D.C.), *cert. denied*, 104 S. Ct. 489 (1983); and, *e.g.*, Complaint in *Seal* v. *Slattery Assoc.*, C.A. No. 83-0396 (D.D.C. filed Feb. 14, 1983).

[27] In *Director, OWCP* v. *National Van Lines, Inc.*, the court formulated a two-part test holding that an employer is a Section 904 "contractor" if it (1) has a contractual obligation and (2) contracts out part of that obligation to a subcontractor. 613 F.2d at 987.

[28] The WMATA Compact is not only a law, but also a contract among the District of Columbia, Maryland, and Virginia. *C. T. Hellmuth & Assoc., Inc.* v. *WMATA*, 414 F. Supp. 408, 409 (D. Md. 1976). Section 12 of the Compact delegated to WMATA the power and contractual duty to construct a rapid transit system for those three sovereign signatories.

In fact, Professor Larson's treatise makes precisely the opposite point—that the term "contractor" has been given a broad construction in order to "maximize the protective reach of the statute." [29] Based on the foregoing, it is apparent why all the lower courts gave this claim summary treatment.[30]

3. In our initial brief, we contended that denying immunity to a securing contractor such as WMATA would undermine the three purposes of the LHWCA—guaranteed worker coverage, swift delivery of benefits, and avoidance of litigation—as well as other congressional purposes. Respondents either ignore this contention or, where they address it, they ignore the record before this Court.

a. Respondents offer two contradictory answers to our contention that denying immunity to a securing contractor such as WMATA risks gaps in worker coverage. They first say that WMATA need not have attempted to cover all its workers. Instead, they argue, "[i]t would not seem impractical for WMATA to send a

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[29] 1C A. Larson, *supra*, § 49.11, at 9-10. Moreover, WMATA fulfills any generalized test derived from Professor Larson's treatise. As he states, the central question in determining "contractor" status is whether the subcontracted work is part of the regular business of the asserted contractor. *Id.* § 49.12, at 9-16. The respondents have not and cannot refute that WMATA's purpose, function, and business is to construct and operate a rapid transit system. The subcontracts let by WMATA are obviously in furtherance of that purpose. Furthermore, any status that WMATA may have as an "owner" *in addition to* its position as overall general "contractor" does not affect its immunity under the Act. 2A, *id.*, § 72.82, at 14-234 to 14-238.

[30] Inasmuch as respondents claim that the policies of the LHWCA are not served by treating WMATA as a "contractor" under that Act, one further point should be made. WMATA, and others like it, would like nothing better than to avoid all workers' compensation obligations through the simple mechanism of declaring itself an "owner." Had it known it could do that, it could have saved over $175 million in premium payments. If the Court now declares WMATA an "owner," it can stop paying premiums immediately. If that happens, respondents may be winners, but many, many other workers will clearly be losers.

simple form letter to each of its 'subcontractors,'" asking that they keep WMATA posted concerning which workers were covered. Resp. Br. 30. This simplistic suggestion is made as if there were no record in this case, and as if the Court of Appeals had not denied WMATA immunity.

The sworn testimony of WMATA's Secretary—a witness deposed by respondents, a witness in the best position to know the facts, and the only witness offering record evidence on the issue—was that, as demonstrated during Phase I of Metro's construction, no practical means were available for ensuring that all subcontractors (of whatever tier) would in fact keep WMATA informed concerning employee coverage. J.A. 263, 284-285. In the far more complex Phase II construction, when there were over 3,100 such subcontractors, what had been a difficult problem of ensuring coverage became an impossible one. The considered judgment of those who were required to confront the issue was that continuous coverage for every employee could be ensured only through WMATA's purchase of a single wrap-up policy. Respondents, who had full opportunity to question WMATA's Secretary or present any other evidence of their own, now purport to deal with the issue by saying "a simple form letter" could have been written. Moreover, respondents' position completely overlooks the fact that if WMATA is denied immunity, then it will have no incentive to ensure coverage at all, whether by wrap-up insurance, a "simple form letter," or otherwise.[31]

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[31] Respondents also contend that WMATA's concern with subcontractor gaps in coverage is in any event misplaced since injured employees may always seek relief directly from their employer or from the "special fund" established under Section 944 of the LHWCA. Resp. Br. 21 n.23. But these alternatives were of course intended by Congress to be *last resorts* for injured employees; the first resort was mandated by Congress in the requirements of Section 904. As the Court of Appeals itself recognized: "The Act is designed to insure that all employees are covered by worker's compensation insurance and will thereby receive prompt compensation for work-related injuries." Pet. App. 51a-52a.

Respondents' second answer to the threatened gaps in employee coverage contradicts their first. "[A] contractor['s] * * * purchase [of] insurance in advance to protect against subcontractor default," say respondents, "would be the only rational thing to do." Resp. Br. 31. They then describe a paritcular kind of policy which they claim would provide the necessary coverage. *Id.* But if WMATA and similarly-situated contractors receive no immunity for securing coverage, the incentive to ensure that coverage (whether through wrap-up or respondents' proposed policy) is gone.[32]

b. Respondents ignore our contention (Pet. Br. 35-36) that requiring a securing contractor to answer in tort will create incentives for that contractor to resist paying compensation benefits—thereby undermining swift, sure delivery of those benefits. Respondents simply claim that it is wrap-up insurance that causes this result. Resp. Br. 32. That is not so. The result is caused by imposing tort liability on the same party providing compensation benefits, no matter what kind of coverage that party has. The premise of the LHWCA is that such a party may be confident of its immunity, and therefore would have no reason to resist swift delivery of benefits. The premise of the Court of Appeals' decision is otherwise.[33]

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[32] Respondents also offer the circular contention that since the policy they propose was written to conform to "most workers' compensation laws," general contractors do not need immunity as "an additional incentive" to purchase such a policy. Resp. Br. 31-32. The answer, of course, is that such "workers' compensation laws" place *a duty* on the contractor to acquire the policy and *grant it immunity* for doing so. *See* 2A A. Larson, *supra*, § 72.31(a) (noting the "majority rule" provides immunity to securing contractors).

[33] Respondents contend that wrap-up insurance provides an incentive for a Section 933(b) statutory assignee not to pursue a third-party action against another party covered by the same insurance. This purported "conflict" issue has nothing to do with WMATA's contention regarding delayed compensation benefits; moreover, it was directly rejected by the Court of Appeals (Pet. App. 60a-64a), and this Court in turn denied review. *Williams* v. *WMATA*, No. 83-822, *cert. denied* (Jan. 16, 1984). *See also Rodriguez* v. *Compass Shipping Co.*, 451 U.S. 596 (1981).

c. In answer to our contention (Pet. Br. 36-39) that denying immunity to securing contractors will induce the very litigation the LHWCA was designed to avoid, respondents make essentially two points: (1) that third-party actions are permitted by the Act; and (2) that the induced litigation may not be as "massive" as we suggest. Resp. Br. 33-35. The first point is true, but irrelevant. Our contention is not that all third-party actions should be prohibited; rather, we claim only that third-party actions against the compensation provider itself were never contemplated by Congress. It is clear that "one of the purposes of the Act is to minimize the need for litigation" [34] and that the Court of Appeals' decision will encourage that litigation. It will do so primarily by inducing litigation between tiered employers as they seek to pass on their liability. Respondents do not deny that this litigation will be encouraged or that the primary gain will be to attorneys, not workers.[35] Their only answer is that we may have overstated how great the litigation boom will be.[36] This, we submit, is no answer at all.

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[34] *Rodriguez*, 451 U.S. at 616; *Bloomer*, 445 U.S. at 86.

[35] Respondents' only answer to our statement that the induced litigation will primarily benefit attorneys is that the statement is "entirely extra-legal." Resp. Br. 35 n.48. This of course is not so. The truth of the statement has been expressly recognized by Congress, this Court, and the lower courts. *See, e.g., Hearings on H.R. 247 et al., Before a Select Subcomm. on Labor of the House Comm. on Education and Labor*, 92 Cong., 2d Sess. 106 (1972); *Bloomer*, 445 U.S. at 83-86; *Del Re* v. *Prudential Lines, Inc.*, 669 F.2d 93, 97 (2d Cir.), *cert. denied*, 103 S. Ct. 81 (1982).

[36] For example, regarding the inevitable indemnity suits, respondents do not deny that they will occur; they merely express the hope that some court may at some point prevent them. Resp. Br. 35 & n.46. Similarly, regarding the considerable number of suits that will result *from this case alone*, respondents say only that the *rate* at which this litigation is burgeoning may have slowed. Resp. Br. 35 n.47. As to this, WMATA notes that respondents' counsel (Ashcraft & Gerel) have filed all but a few of the 110 suits resulting thus far, and that they control the rate at which that number will grow.

d. Respondents assert that this Court may not even consider the ways in which the decision below transgresses congressional intent, if those transgressions do not "reflect palpably on Congress' intent in enacting the LHWCA." Resp. Br. 36. This is not correct. This Court has repeatedly made clear that different congressional actions should be construed to harmonize, rather than conflict with one another.[37] The LHWCA should be construed, if possible, not to undercut other congressional purposes. As we showed in our initial brief (Pet. Br. 39-46), the decision below undercuts three other congressional purposes by (1) undermining the congressionally-endorsed wrap-up insurance program; (2) promoting divergent results within the States of the Metro system—which respondents expressly concede to be contrary to Congress' purpose (Resp. Br. 39); and (3) reducing the number of minority participants in federally-funded programs—which, again, respondents concede to be contrary to federal goals (Resp. Br. 41). Other than asking the Court to ignore these results (Resp. Br. 36, 38, 39, 41), respondents have little to say.

Respondents speculate that the wrap-up program will end "only if it is determined by Congress, the District of Columbia government, or the courts that the plan violates public policy * * * [or] that it does not satisfy the employer's duty under Section 904(a)." Resp. Br. 37. But the Court of Appeals' decision clearly holds that the wrap-up plan does not satisfy WMATA's Section 904(a) duty, and the undisputed testimony of WMATA's Secretary was that the program was instituted to meet that very duty. J.A. 263-265, 299. Furthermore, it is unreasonable to anticipate that the governments involved will continue the wrap-up program if there is no duty to do so and if the compensation provided by the program serves to fund subsequent tort suits against WMATA.[38] These governments can hardly

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[37] *See FAA Adm'r* v. *Robertson*, 422 U.S. 255, 266 (1975); *Morton* v. *Mancari*, 417 U.S. 535, 551 (1974).

[38] Respondents also speculate that the expectation of *quid pro quo* immunity could not have been a factor in the implementation of

be expected to continue to fund an expensive "voluntary" program from which WMATA receives no benefit. Finally, it is unrealistic to suppose that carriers will continue underwriting wrap-up policies when a primary advantage of such policies—ending indemnification suits among coinsureds (Pet. Br. 39-40 n.56)—has been eliminated.

Respondents next argue that the Court of Appeals' decision will not produce divergent results within the Metro system, since the workers' compensation laws of Virginia and Maryland would deny WMATA immunity. Resp. Br. 38-39. Respondents' entire argument is based on the claim that WMATA is not in the "construction business," even though it is empowered under Section 12 of the WMATA Compact to construct the Metro system and, in fact, performs that role as a general contractor.[39] In essence, respondents simply reiterate their erroneous argument that WMATA is not a general contractor.[40]

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the wrap-up program. Resp. Br. 36. This argument supposes complete ignorance of workmen's compensation laws on the part of WMATA officials, *i.e.*, that they thought the traditional *quid pro quo* would not follow their $175 million decision to meet their Section 904 duty. Moreover, the studies cited by respondents provide no support whatever for their surmise (*id.* at n.49); indeed, one of those studies expressly deals with the "problem" of "third party" suits, and does not even mention the possibility that the compensation provider might itself be considered a third party. Instead, the report contemplates, as would be expected, that such provider would receive immunity. Barrett, *Insurance for Urban Transportation Construction*, Report No. UMTA-MA-06-0025-77-13, at 4-9 (Dept. of Transp. 1977).

[39] Virginia provides immunity for a securing contractor when its subcontractor performs the contractor's "business or occupation." Va. Code Ann. §§ 65.1-29, 65.1-30 (1980). WMATA's "business or occupation" is to construct Metro. *Anderson* v. *Thorington Constr. Co.*, 201 Va. 266, 110 S.E.2d 396 (1959), *appeal dismissed*, 363 U.S. 719 (1960) (Turnpike Authority empowered to construct and operate turnpike project is a statutory employer of subcontractors engaged to construct the turnpike). Similarly, Maryland provides immunity to a principal contractor who has subcontracted out part of its business or occupation. Md. Code Ann., art. 101, § 62 (Michie 1979). *See generally* Va.-Md. Br. 4-5 & n.2.

[40] *See* discussion at pp. 12-14, *supra*.

Finally, respondents concede that a "primary positive effec[t]" of WMATA's wrap-up insurance is that it increases minority participation, a result respondents admit is in furtherance of an important federal goal. Resp. Br. 40-41. Respondents argue, however, that this policy goal should be ignored and that there is in any event a trade-off between job safety and meeting "affirmative action goals." Resp. Br. 41.[41] This contention is unresponsive, unfair, and incorrect.[42]

The judgment below should be reversed.

Respectfully submitted,

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[41] Respondents also assert that minority contractors can obtain "assigned-risk" policies at "competitive rates." Resp. Br. 40-41 n.57. If they mean by this that such policies can be obtained at rates equal to those available to established firms, this of course is not true. Assigned-risk policies typically include a substantial surcharge and, while there may be a ceiling for such rates, they will unquestionably be greater than those charged more established firms with known loss records.

[42] Respondents erroneously contend that there are "inherent safety risks" in engaging minority businesses. Resp. Br. 41. It is primarily the fact that minority contractors are relatively new concerns without established loss records that causes their increased premiums (Pet. Br. 45); experience has proven that some of WMATA's minority contractors have excellent safety records.